



# The Emerging Role of Ethics Advisors, General Counsel, and other Compliance Specialists in Large Law Firms

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# THE EMERGING ROLE OF ETHICS ADVISORS, GENERAL COUNSEL, AND OTHER COMPLIANCE SPECIALISTS IN LARGE LAW FIRMS

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## I. INTRODUCTION

Anecdotal evidence suggests that large law firms increasingly are turning to in-house ethics advisors, firm general counsel, and other specialists to manage the firm's compliance with professional regulation.<sup>1</sup> According to one account, "most large law firms have their own in-house ethics gurus, people who are expected to set policy and provide ethics advice on internal matters, malpractice claims and similar issues."<sup>2</sup> Moreover, in the past ten years, a number of firms have created formal management positions such as "risk manager" and "general counsel."<sup>3</sup> Robert A. Creamer, Vice President and Loss Prevention Counsel for the Attorneys' Liability Assurance Society (ALAS), a mutual insurance company

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1. See Jonathan M. Epstein, *The In-House Ethics Advisor, Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1028–29 (1994); David Hricik, *Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas*, 16 REV. LITIG. 706 (1997); Peter R. Jarvis, *Ethics Advisors Watch Over Firms*, NAT'L L. J., July 13, 1992, at 15; Daniel Kennedy, *New Trend is General Counsel in Firms*, A.B.A. J., Jan. 1995, at 29; Gary Taylor, *Counsel to Firms Goes In-House: Legal Costs Are Leading Firms, Like Their Clients, to Look Inside for Advice*, NAT'L L. J., July 18, 1994, at A1.

2. Hricik, *supra* note 1, at 706.

3. See Kennedy, *supra* note 1, at 29 (discussing the creation of a general counsel position at Winston & Strawn); Taylor, *supra* note 1, at A1 (discussing the creation of general counsel positions at Arter & Hadden of Cleveland, Gardere & Wynne LLP of Dallas, and Munsch, Hardt, Kopf, Harr & Dinan of Dallas).

owned by large law firms,<sup>4</sup> reports that there are over 875 “loss prevention partners” in ALAS member firms alone.<sup>5</sup>

Most commentators attribute firms’ increasing reliance on in-house compliance specialists to the increasing complexity of professional regulation<sup>6</sup> and the increasing number of claims against lawyers.<sup>7</sup> “It’s a dangerous world that large law firms are in now,” says one managing partner. “We are attractive defendants.”<sup>8</sup> In addition to managing claims and potential claims against the firm, proponents argue that in-house specialists may play an important preventive role by increasing firm-wide awareness of ethics and regulatory issues.<sup>9</sup> According to a recently-appointed general counsel, “A lot of law firms have a lot of problems they don’t know about because there is no central repository for hearing them.”<sup>10</sup>

From a regulatory standpoint, the emergence of in-house compliance specialists is a pivotal development. Research in other organizational contexts shows that such specialists tend to promote the development of compliance procedures within firms,<sup>11</sup> and may play a leading role in defining industry

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4. ALAS has played an important role in promoting the formal appointment of in-house compliance specialists. See Taylor, *supra* note 1, at A1. The title preferred by ALAS is “loss prevention partner.” We discuss the role of ALAS in Part IV, below.

5. Personal communication with Creamer (May 9, 2002).

6. See Epstein, *supra* note 1, at 1012 (stating that legal ethics “has become a substantive area of law requiring specialized expertise”); Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 103, 104 (2000) (stating that “in light of the increasing complexity of legal ethics issues, it makes no more sense to have everyone at the firm be an expert in legal ethics than it would to have everyone . . . be an expert in the details of ERISA . . .”).

7. See Epstein, *supra* note 1, at 1012, 1018–24 (discussing the “growth in the number and size of awards for legal malpractice”); Taylor, *supra* note 1, at A1.

8. Taylor, *supra* note 1, at A1 (quoting Steve C. Ellis of Arter & Hadden).

9. See Epstein, *supra* note 1, at 1012, 1030–31 (discussing the ombudsman and risk management functions of in-house ethics advisors).

10. Taylor, *supra* note 1, at A1 (quoting James D. Jordan of Munsch Hardt).

11. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1546, 1565 (1992) (finding that between 1964 and 1990, organizations with personnel departments created formal Equal Employment Opportunity [EEO] policies at almost twice the rate of other organizations); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1416–17, 1434 (1990) [hereinafter Edelman, *Legal Environments*] (finding that the presence of personnel professionals significantly increased the rate at which organizations adopted due process protections in the late 1970s); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47, 74–79 (1992) (arguing that lawyers and other compliance specialists have a professional incentive to promote internal compliance procedures, even in the absence of a significant legal threat); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 807–08 (1996) (finding that personnel professionals and labor lawyers played a “sequential” role in promoting employers’ adoption of nonunion grievance procedures).

standards for compliance.<sup>12</sup> This research suggests that in-house specialists may shape the future of law firm regulation. Except for a few news stories,<sup>13</sup> however, and a description of in-house ethics advising at one Oregon law firm,<sup>14</sup> we know virtually nothing about the work of such specialists or their role within law firms.

This paper investigates the emerging role of compliance specialists in large law firms. The paper is based on focus groups<sup>15</sup> and interviews<sup>16</sup> with ethics advisors, general counsel, and other compliance specialists in a non-random sample of thirty-two law firms ranging in size from seventy-five to 1,000-plus lawyers<sup>17</sup> and headquartered in twelve different cities.<sup>18</sup> Our sample can best be described as a “snowball” (or “reputational”) sample,<sup>19</sup> in that we asked a small number of bar leaders and ethics specialists known to us to recommend

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12. See Edelman, *Legal Environments*, *supra* note 11, at 1434 (finding that personnel professionals played a central role in “transforming legal norms into organizational policy”); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 412–45 (1999) [hereinafter Edelman et al., *Endogeneity of Legal Regulation*] (finding that lawyers and personnel professionals promoted the adoption of nonunion grievance procedures before such procedures had any legal value as a defense to EEO claims); Lauren B. Edelman & Marc C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 498–501 (1997) [hereinafter Edelman & Suchman, *Legal Environments*] (reviewing research on the role of lawyers and other compliance professionals in constructing organizational standards for “compliance”); see also Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983) (discussing the role of professional groups in shaping organizational norms).

13. See sources cited *supra* note 1.

14. See Jarvis & Fucile, *supra* note 6 (describing their own in-house ethics practice at Stoel Rives LLP); see also Epstein, *supra* note 1, at 1041–42 (discussing Jarvis’ practice at Stoel Rives).

15. Most of our data come from three focus groups of ten to fifteen participants each. In addition to in-house compliance specialists, some focus groups included bar regulators, insurers, and other academics. Each focus group began with an informal dinner for participants and continued the next day with two formal sessions of 90–120 minutes each. We label the focus groups A, B and C, and refer to participants in each focus group by a unique number (e.g., A1, A2, B1, etc).

16. We supplemented the focus group data with follow-up interviews with some participants. Our sample also includes three people who did not participate in the focus groups, but whom we interviewed individually by telephone. These interviews lasted thirty to sixty minutes each. We refer to interview subjects with the letter I and a unique number (i.e., I1, I2, and I3).

17. The breakdown of firms by size category is: 75–150 lawyers (five firms); 151–250 lawyers (six firms); 251–500 lawyers (ten firms); 500–1,000 lawyers (seven firms); 1,000-plus lawyers (four firms).

18. The cities with more than one firm in the sample are New York City (ten firms); Boston (six firms); Chicago (four firms); Philadelphia (three firms); and Washington, D.C. (two firms).

19. See Leo A. Goodman, *Snowball Sampling*, 32 ANNALS OF MATHEMATICAL STAT. 148 (1961) (defining snowball sampling); Charles Kadushin, *Power, Influence and Social Circles: A New Methodology for Studying Opinion Makers*, 33 AM. SOC. REV. 685, 694–96 (1968) (discussing the strengths and weaknesses of snowball sampling).

participants for our study; then asked these participants for more names, and so on; until we felt that we had enough data to present interesting preliminary findings. All but four of the participants in our study spend at least 300–500 hours per year on in-house compliance work,<sup>20</sup> and half spend significantly more (or all) of their time on this function. The research was conducted between May 2001 and March 2002.

Our exploratory analysis is organized around three sets of questions. First, to what extent is “compliance specialist” a coherent unit of analysis? Does it make sense to lump together “ethics advisors,” “general counsel,” “loss prevention partners,” “conflicts committee chairs,” and other lawyers whose titles seem to indicate a diverse set of management roles? To what extent do different titles correspond to different roles?

Second, what is the typical structure of the compliance specialist’s position? Are most specialists members of committees or are they primarily alternatives to committees? Are most specialists also practicing lawyers; that is, do they also have outside clients? Do firms compensate practicing lawyers for in-house compliance work? To what extent do structural variations affect the scope of the specialists’ role? To what extent do structural variations reflect the needs (versus the values) of the firm? What are the strengths and weaknesses of different structural arrangements?

Finally, what are the personal and professional characteristics of in-house compliance specialists? At what stage in their careers do lawyers typically take on this role? Do in-house specialists tend to come from similar practice backgrounds? Do they share a common attitude toward their role(s) within the firm? To what extent do in-house specialists interact with each other professionally?

Our analysis is based on self-reports by specialists and therefore is primarily descriptive rather than evaluative. The chief goals of the paper are to identify questions for more systematic empirical analysis, and to call attention to the potential importance of in-house compliance specialists for law firm regulation. We believe that the profession’s current approach to law firm discipline,<sup>21</sup> which relies on case-by-case enforcement by state disciplinary

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20. Four participants reported that they spend less than 300 hours per year on in-house compliance work. One is retired and based his comments on his previous role as a malpractice defense lawyer and chair of his firm’s ethics committee for ten years; one is an associate being groomed to take over from the current in-house specialist; one is a member of a firm-wide ethics committee who serves as the point person for his seventy-lawyer office; and one is a member of a four-person ethics committee that rotates the “point person” role every month.

21. Professor Ted Schneyer was the first to call for “professional discipline” for law firms, in his classic article by the same title. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991). Schneyer called for the imposition of a firm-level duty of supervision under Model Rule 5.1(a), which currently imposes supervisory duties only on individual partners. *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2000) (requiring law firm partners to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct”). Subsequent debate within the profession about the regulation of law firms as entities has focused narrowly on the question of whether to

authorities,<sup>22</sup> is out of step with regulatory approaches in other organizational contexts. We want to explore an alternative model of “enforced self-regulation” by firms,<sup>23</sup> which would rely heavily on in-house compliance specialists.<sup>24</sup> By studying the work of such specialists and their emerging role within firms, we hope to contribute to their effectiveness, and to effective self-regulation by firms.

## II. “COMPLIANCE SPECIALISTS” AS A UNIT OF ANALYSIS

Large organizations tend to respond to complex and/or ambiguous regulation by turning to in-house compliance specialists—such as, for instance, corporate counsel<sup>25</sup>—to define the threat of liability and design the appropriate organizational response. For instance, studies of employers’ responses to equal employment opportunity (EEO) legislation show that lawyers and personnel professionals played a critical role in defining employers’ initial strategies for compliance, and in spreading particular compliance structures among firms.<sup>26</sup> The literature on corporate compliance likewise shows that internal “compliance

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impose an entity duty under Rule 5.1(a). *See, e.g.*, ETHICS 2000 COMMISSION, AM. BAR ASS’N, CHANGES FROM THE NOVEMBER 2000 REPORT TO THE MAY 2001 REPORT, *available at* [http://www.abanet.org/cpr/e2k-chan\\_jun.html](http://www.abanet.org/cpr/e2k-chan_jun.html); ETHICS 2000 COMMISSION, AM. BAR ASS’N, FINAL REPORT, June 9, 2001, *available at* [http://www.abanet.org/cpr/e2k-mlove\\_article.html](http://www.abanet.org/cpr/e2k-mlove_article.html) (rejecting a proposal to amend Rule 5.1(a)).

22. New York and New Jersey have amended their rules of professional conduct to impose a duty of supervision on law firms. *See* N.J. R. PROF’L CONDUCT 5.1; N.Y. JUDICIARY LAW DR 1-104 (McKinney 2001).

23. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101–32 (1992) (defining “enforced self-regulation” and discussing its strengths and weaknesses as a regulatory strategy); John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1980). Under enforced self-regulation, “each firm . . . is required to propose its own regulatory standards if it is to avoid harsher (and less tailored) standards imposed by the state.” AYRES & BRAITHWAITE, *supra*, at 101.

24. *See* Elizabeth Chambliss, *MDPs: Toward an Institutional Strategy for Entity Regulation*, 4 LEGAL ETHICS 45, 56–64 (U.K.) (2002) (criticizing the ABA’s command-and-control approach to entity regulation and calling for more institutional support for in-house compliance specialists); Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, GEO. J. LEGAL ETHICS (forthcoming 2003) (proposing that law firms be encouraged to invest in in-house compliance specialists); *see also* AYRES & BRAITHWAITE, *supra* note 23, at 125–28 (stating that “an independent internal compliance group is essential to the success of an enforced self-regulation scheme”).

25. *See* Mary C. Daly, *The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L. J. 1057, 1059–63 (1997) (discussing the growth in the number of corporate counsel in the 1970s and 1980s and the expansion of their “regulatory counseling” function).

26. *See, e.g.*, Edelman, *Legal Environments*, *supra* note 11, at 1416–17, 1434 (discussing the role of personnel professionals); Sutton & Dobbin, *supra* note 11, at 807–08 (discussing the “sequential” role of personnel professionals and labor lawyers); Edelman et. al., *Endogeneity of Legal Regulation*, *supra* note 12, at 408 (finding that professional “stories about the legal value of [nonunion] grievance procedures . . . influence both organizational adoption of the procedures and legal considerations by courts”).

professionals” play an increasingly central role in corporate self-regulation.<sup>27</sup> This literature suggests that as law firms grow larger and professional regulation grows more complex, we should see the emergence of in-house specialists charged with managing firms’ compliance, and an increasing role for such specialists in law firm management.

The professional development of compliance specialists may be a gradual process, however. In the early stages, there may be substantial variation in specialists’ titles and status within firms, and little external networking or professional organization among specialists.<sup>28</sup> Further, like any professional group, the success of in-house compliance specialists in establishing themselves—and their authority—within firms depends in part on the extent to which they mobilize around a viable market niche.<sup>29</sup> The status of corporate counsel, for instance, has changed substantially since the early days when they were called “kept” lawyers and viewed primarily as individuals who could not make partner in law firms.<sup>30</sup>

Our research suggests that the professional development of compliance specialists is just beginning in law firms. All of the firms in our sample rely on in-

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27. See JOHN BRAITHWAITE, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY 139, 143–49 (1984) (discussing the role of “quality control directors” in the pharmaceutical industry); JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY 60–61 (1988) (discussing the role of compliance personnel in occupational health and safety regulation); Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1235–52 (2000) (discussing the increasing use of “gatekeeper enforcement strategies” in corporate governance); Barra Little, *Consultants and Lawyers in a Professional No-Man’s Land* (2000) (unpublished manuscript, on file with authors) (reporting the use of internal conflicts specialists in consulting firms); Christine Parker, *Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism*, 6 INT. J. LEG. PROF. 175, 177–88 (1999) (discussing the rise of “compliance professionalism” in the U.S. and the U.K.).

28. See, e.g., James N. Baron et al., *War and Peace: The Evolution of Modern Personnel Administration in U.S. Industry*, 92 AM. J. SOC. 250, 300 (1986) (examining the early development of the personnel profession); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 n.1 (1989) (tracing the development of the “corporate counsel” title from “kept” counsel in the 1920s, to “house” counsel in the 1930s, to “corporate” counsel beginning around 1945).

29. See generally ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE EXPERT DIVISION OF LABOR 33–113 (1988) (arguing that professions develop through “jurisdictional” claims in the workplace, in public, and in law); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 180 (1977) (arguing that “the main instrument of professional advancement . . . is the capacity to claim esoteric and identifiable skills . . . . The claim of expertise aims at gaining social recognition and collective prestige which, in turn, are implicitly used by the individual to assert his authority and command respect in the context of everyday transactions . . .”).

30. See Rosen, *supra* note 28, at 481–89; Daly, *supra* note 25, at 1059–66 (discussing changes in the professional status of American corporate counsel); see also Mary Adelman Legg, *The In-House Life*, LEGAL TIMES, Nov. 19, 2001, at 18 (reporting the results of the American Lawyer’s 2001 General Counsel Compensation Survey, which found that the 100 highest paid general counsel received an average of more than \$1million in salary and bonuses in 2000, not including stock options).

house compliance specialists to some extent; indeed, we chose the firms on that basis. In most firms, however, the specialist's role has "evolved" (rather than being "created") and many specialists' positions have been formalized only recently. Further, specialists' titles vary substantially and have only a loose correspondence with their functional roles. Thus, while the firms in our sample clearly are moving toward the use of in-house compliance specialists, there is not yet an industry standard regarding specialists' titles or roles. We therefore define our unit of analysis in broad, functional terms.

#### *A. The Emergence of In-House Compliance Specialists*

All the firms in our sample have at least one partner with special responsibility for promoting ethics and/or regulatory compliance within the firm. In most firms (twenty-six out of thirty-two), the position is formal, in that the specialist has a formal title and the responsibility does not rotate; however, in all firms, the specialist's role is recognized informally throughout the firm (as in "he's our ethics guy").

Most participants emphasized the "evolutionary" nature of their positions. Typically, among those with formal titles, the position began informally and expanded over time as a concomitant of firm growth. Thus, in most cases, the formalization of participants' positions was a recognition of their functional role, rather than the product of proactive design. The following comment is illustrative:

Go to any firm around the country and you'll find a different way in which the ethics function evolves in that firm, that's consistent with that firm's practice, consistent with the firm's structure generally and consistent with the culture of the firm . . . . At [my firm], when I joined the firm 20 years ago, there was a senior partner with a copy of the Model Code in his office and that was the ethics department. And that was outdated even then, in a firm of 180 lawyers. Then, another senior partner succeeded in that role and started grooming me to take over since I had an interest in the field. And before long, people stopped going to him and started coming to me . . . I have taken the title of ethics partner just to have something to call myself, but I have never been officially appointed anything. There is no ethics committee. A few years ago . . . I suggested we form a committee and the response from the executive committee was, "What would the ethics committee do? It would just rubber stamp everything you say." I haven't, quite frankly, done anything to push it because I'm happy having people view me as indispensable. [A4]

One indication of the emergent nature of the in-house compliance specialist's role is the wide variation in participants' titles. Some titles are so idiosyncratic that to list them might jeopardize participants' anonymity; however, the more generic titles in our sample include: firm counsel, general counsel, or attorney to the firm (n=10); ethics partner, ethics advisor or professional responsibility advisor (n=7); chair or co-chair of the ethics or professional responsibility committee (n=9); conflicts partner or chair of the conflicts committee (n=4); risk management or loss prevention partner (n=3); *pro bono* partner or *pro bono* coordinator (n=3); and ombudsman (n=1). Many participants



(n=12) have more than one title indicating an ethics or regulatory function (for instance, firm counsel and loss prevention partner).

Further, participants' titles correspond only loosely to their functional roles. Some participants have outgrown their titles as their specialist role has evolved. Some participants' titles are new and have yet to be institutionally defined. In many firms, the role and jurisdiction of related committees is in flux. Thus, as we discuss in the next two sections, participants' titles are not a reliable basis for functional classification.

### ***B. The Relationship Between Title and Substantive Jurisdiction***

One of our central questions going into the study was what kinds of substantive issues in-house specialists address. Previous studies of the development of ethical infrastructure in law firms find that most firms have special structures for managing conflicts of interest (such as conflicts procedures and committees),<sup>31</sup> but that firms may invest relatively little in other types of ethical infrastructure.<sup>32</sup> For instance, a 1995 survey of 191 Texas law firms found that most firms do not monitor partners' compliance with internal procedures other than conflicts and billing procedures, and only half of the firms engage in any form of peer review.<sup>33</sup> Similarly, a 1997 survey of thirty-one law firms found that twenty-five have a conflicts partner, but only eight have an ethics committee that meets on a regular (versus ad hoc) basis.<sup>34</sup> This literature suggests that conflicts of interest (and related issues such as client intake and lateral hiring) may be the primary substantive jurisdiction for most in-house specialists.

On the other hand, Peter Jarvis and Mark Fucile, in describing their own in-house ethics practice, report that they provide individual counseling on a wide range of issues, including conflicts and intake (which they list first); attorney-client privilege and work product; advertising and solicitation; communication with represented parties; lateral hiring and departure; fees, billing and trust accounts; mandatory and permissive withdrawal; and the duty to report misconduct by other

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31. See Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 285 (1997) (reporting that seventy-five percent of 191 Texas law firms surveyed periodically monitor partners' compliance with conflicts procedures); Lee A. Pizzimenti, *Screen Verite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 322 (1997) (reporting that all thirty-one firms surveyed have a "well-developed system for detecting conflicts"); Stephen R. Volk et al., *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 BUS. LAW. 1567, 1571-81 (1993) (reporting that all twenty-six law firms surveyed have a formal system for managing conflicts of interest).

32. See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 697-99 (2002) (analyzing recent surveys on the development of ethical infrastructure in large law firms).

33. See Fortney, *supra* note 31, at 284-85, 289-90.

34. See Pizzimenti, *supra* note 31, at 322. Because of the small sample size, we report raw numbers rather than percentages.

lawyers.<sup>35</sup> Moreover, in addition to individual counseling, Jarvis and Fucile alert the firm to regulatory developments, help the firm develop standardized forms (such as conflicts waivers), provide in-house ethics training, publish a quarterly professional responsibility newsletter, maintain intranet and internet resources, and—when necessary—respond to bar complaints and motions for disqualification.<sup>36</sup> Their description suggests a much broader substantive jurisdiction for in-house specialists.

As we discuss in Part III, we found that this spectrum—from “conflicts” to “broader”—was a useful spectrum for crudely classifying participants’ substantive jurisdictions. As we discuss in this section, however, participants’ titles do not necessarily correspond to their place on the spectrum. In some firms, for instance, the “ethics partner” focuses primarily on conflicts of interest; in others, the “ethics partner” handles a broad range of issues. As one participant put it:

When you talk about “ethics,” some people are just talking about conflicts and that’s the only thing they—their firm—deals with. Others are talking about a wide range of things . . . So I don’t think when a firm talks about fulfilling its ethics function, that it—that two firms necessarily envision it the same way. [A13]

Likewise, in a number of firms, the jurisdiction of the “conflicts committee” has expanded over time in response to issues that come up in the firm. The following account is typical:

It started as a process of conflicts . . . [and] evolved from that, as the firm grew, and the complexity of these issues grew, kind of like the common law grows, incrementally. Until three years ago the entity . . . fairly randomly, continued to be called the conflicts committee. I made a little list last night of the kinds of things that had come to that committee . . . beyond . . . intake issues. The committee became a professional responsibility committee in fact, although not in name . . . [as] other problems . . . arose . . . [B3]

In fact, some participants had trouble defining their own jurisdictions. One participant, who is the chair of his firm’s ethics committee, said:

I don’t think you could find a piece of paper in our firm that defines the jurisdiction of the ethics committee. There is no such official charge . . . It kind of developed, I would say, because of how the particular managing partner . . . structured [it], as well as what other people have come to me about . . . At this point, I’ve been doing this for five years, and so it has taken on a life of its own. [C1]

The looseness of the match between title and jurisdiction was reflected in some participants’ response to our initial invitation to participate in a focus group for “in-house ethics advisors.” Several participants suggested that we ought to talk to someone else in the firm (for instance, “Oh, you want the conflicts partner,” or “Oh, you want the general counsel”). This response did not come from people with any particular set of responsibilities but rather, it seems, from the lack of a

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35. See Jarvis & Fucile, *supra* note 6, at 108–11.

36. *Id.* at 106–08, 111.

standard title or jurisdiction for the role that we are studying. (We subsequently amended our invitation to include additional titles.)

*C. The Relationship Between Title and the Role of Committees*

Participants' titles also do not reliably indicate the role of committees, or the presence or absence of other types of ethical infrastructure in the firm. Some participants are "chairs" of committees, but they do the bulk of the committee's work. As one chair of his firm's ethics committee observes:

We have a committee, two members of which are supposedly the ethics panel for the week, but by and large, ninety-nine percent of the time, if I am in the office, the call will not go to the two people who are on this week's panel, it will come to me. That one percent of the time when it goes to the other two people on the panel, they might say, maybe you want to call [the speaker], when he gets back to the office. [Laughter.] [B10]

In other cases, the in-house specialist co-exists with a committee, but the committee rarely meets. The following example comes from a participant with several titles, including "conflicts partner":

We do have an ethics committee at [my firm] but it doesn't meet . . . except under extraordinary circumstances. [Instead] there are three of us who spend a fair amount of time on ethics work. I spend almost all my time. [A7]

Finally, many firms have more than one partner who acts as an in-house compliance specialist, as well as one or more functioning committees, again with wide variation in titles and jurisdictional divisions. Consider the following descriptions of the "general counsel" position:

In my case, I'm general counsel of the firm. The professional responsibility committee deals with conflicts, practice statements, fiduciary positions, client intake issues, things of that sort. My role deals with risk management, claims, firm governance, employment problems, partner issues, departures. Like you expect . . . there is a fair amount of overlap . . . [B11]

I combine the corporate counsel function with the ethics function and I'm backed up by two partners who have extensive ethics experience and they're large resources as to consultation and handle things when I am out of town. I handle the claims aspect too. And any disciplinary matters, which fortunately don't happen too often. [A2]

[In my firm] the counsel to the firm is more the business lawyer for the firm . . . We have a loss prevention partner too, and there, there is more overlap [with my position as ethics partner] . . . I'm gone today and tomorrow and he's answering . . . questions in my absence, [just as] I would in his absence. [A14]

We explore the strengths and weaknesses of various structural arrangements at the end of Part III, below. For now, the point is that specialists'

titles do not have common definitions across firms, and may reveal relatively little about the substance and structure of the specialist's role.

#### *D. Some Exceptions to the Evolutionary Model*

Participants did report some exceptions to the "evolution" of their positions. Three participants proactively lobbied for and designed their own jobs. Two cases involved female litigation partners who created their own full-time in-house positions, in part so that they could take time to raise children.<sup>37</sup> The third case involved a partner on the management committee who lobbied for what eventually became a full-time "conflicts" position. He recounts:

When I was on the management committee—this was about 15 years ago—there was a senior partner in his 70s who was doing our conflicts of interest work and I began to get concerned. He was spending more time on the golf course than worrying about conflicts and I shadowed his work for a number of months and finally reported to my colleagues that somebody else ought to do it and of course, they appointed me. And I began to get fascinated by conflicts of interest . . . . Each of our offices outside [the main office location] has someone who is fairly conversant, but we are quite centralized also. It evolved as malpractice problems in large and smaller firms became much more acute and conflicts in particular became an extremely important part of those proceedings. We saw that we institutionally needed to have a tight ship. We do all the conflicts clearance out of [the main office location] and that's—it's an evolution and reactive, I guess to what was going on in the profession—but it was a planned management procedure. [A7]

Another exception to the evolutionary model involved a merger. One participant's position was created as part of a set of strategic decisions for managing a merger with another firm. As in the previous example, the position created was a full-time position for managing conflicts of interest. As this "general counsel" explained:

When we went through the combination . . . things got a lot non-evolutionary. We sat down and said well, we have [hundreds of] lawyers in [other jurisdictions] . . . all doing conflicts differently . . . . At that point, a whole lot of people got different jobs because this is going to be centralized, there weren't going to be cowboys, there couldn't be cowboys . . . . No more clearing your own conflicts. It was a huge jerk for most people . . . . We knew that conflicts was going to be the largest issue . . . and if we didn't get it right it was going to be a big, big problem. [A8]

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37. These cases raise interesting questions about the relative attractiveness of full-time in-house positions for women with family responsibilities. See Grace M. Giesel, *The Business Client is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and in the Legal Profession*, 72 NEB. L. REV. 760, 786–89 (1993) (reviewing research on the representation of women in corporate law departments and discussing some of the advantages of in-house practice for women with family responsibilities).

Taken together, these exceptions illustrate two sets of incentives for the proactive creation of in-house compliance positions: the personal and professional interests of individual lawyers; and managers' concerns about liability for conflicts of interest. Significantly, all four exceptions involve full-time, compensated positions, which necessarily require a proactive management decision. Notwithstanding these exceptions, however, the general pattern reported by participants was one of ad hoc evolution and expansion into increasingly formal positions, with wide variation in position titles and roles. We now turn to the structure of specialists' positions within firms.

### III. THE STRUCTURE OF SPECIALISTS' POSITIONS WITHIN FIRMS

Obviously, law firm management structure is partly a function of organizational imperatives such as size and the number of offices. As firms have grown, they have moved increasingly toward formal, centralized management by full-time managing partners and other non-practicing specialists.<sup>38</sup> Thus, we would expect firm size to be an important determinant of firms' investment in in-house compliance specialists.<sup>39</sup>

Size is not everything, however. Many lawyers are resistant to the rationalization of law firm management, because it constrains individual autonomy and creates a hierarchy among partners, which conflicts with the democratic premise of the partnership form.<sup>40</sup> Thus, many firms remain committed to decentralized management-by-committee, in which partners rotate management responsibilities while maintaining their own full-time practices.<sup>41</sup> Such firms may

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38. See MARC GALANTER & THOMAS M. PALAY, *THE TRANSFORMATION OF THE BIG LAW FIRM* 48-49 (1991); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 147-50 (1988) (discussing large law firms' tendency toward bureaucratic organization and management); Steven Brill, *The End of Partnership?*, AM. LAW., Dec. 1989, at 3 (discussing firms' increasing use of full-time managing partners); Mike France, *Managing Partner: The Tender Trap*, NAT'L L.J., Feb. 6, 1995, at A1 (stating that "almost all [large firms] have one full-time (or nearly full-time) leader who sets strategy, speaks to the press and hires lateral partners"); Special Report, *Behind the Scenes: D.C. Area Administrators on Bosses (Everyone), Budgets, and Business*, LEGAL TIMES, May 21, 2001, at 41 (discussing firms' use of professional managers); see also James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461, 466-71 (1989) (discussing firms' increasing use of management consultants).

39. See, e.g., Fortney, *supra* note 31, at 289, 289 n.107 (finding that firms with fifty or more lawyers are more likely than smaller firms to have a designated ethics partner or committee); see also Chambliss & Wilkins, *supra* note 32, at 700 (discussing the relationship between firm size and ethical infrastructure).

40. See NELSON, *supra* note 38, at 86-124, 231-90 (discussing the tension between bureaucratic management and professional ideology).

41. See, e.g., Renee Deger, *Four Gray Cary Partners Elected to Management Team*, AM. LAW., Oct. 19, 2000, at 6 (discussing Gray Cary's commitment to decentralized management).

be unlikely to invest in compliance specialists, especially on a full-time basis.<sup>42</sup> As one participant explains:

Many of the functions in our firm are still handled by committees of lawyers for whom it is not their principal job, who do it as a committee in order to share the burden with other lawyers, and not as a substantial part of their time, and for whom the function is not a major element in their compensation, on the theory that each of us is performing some administrative role . . . . So one thing that occurs to me is . . . it is not so much a size-of-the-firm issue as a management-style-of-the-firm issue. [B9]

Some question whether law firms—especially large firms—can continue to get away with “taking turns” as a management strategy.<sup>43</sup> In an era of eat-what-you-kill compensation and intense pressure for client intake, busy partners may have little incentive to take on uncompensated management roles. Even the role of managing partner reportedly has become harder to fill.<sup>44</sup> As a result, some argue, large law firms tend to be under-managed.<sup>45</sup>

At the same time, there may be benefits to decentralized management, especially in the compliance context, because it involves more partners in promoting compliance within the firm. As one senior partner explains:

We have a managerial point of view that favors committee structure . . . . We have a hiring committee, we have a compensation committee, we have, of course, an executive committee, we have a billing committee, we have a bunch of other committees. We’re something now close to 500 lawyers . . . . If you have a committee that deals with this kind of thing over time, and you have a stream of partners that serve on it over time, you will, over time, have a relatively well-sensitized partnership . . . . My experience is that we have probably twenty alumni of the [professional responsibility] committee in the partnership who understand these issues from having had to deal with them, and therefore are reasonably good missionaries to others who have not yet done it in creating a culture and a compliance attitude. [B3]

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42. As law firm management consultant Joel Henning predicted in 1994, “I don’t see even big firms hiring full-time general counsel. They are hardly used to the idea of full-time managing partners.” See On-line Roundtable, *Learning from Baker & McKenzie*, AM. LAW., Oct. 1994, at 83.

43. See Joel A. Rose, *Who Makes the Best Lawyer-Manager? Lawyer-Managers Must Balance Concerns of Firm and Attorneys*, LEG. INTELLIGENCER, Jun. 19, 2001, at 5 (arguing that “no longer is it feasible for partners to take turns serving on the management committee”).

44. See France, *supra* note 38, at A1 (discussing economic and other disincentives for practicing partners to take on the managing partner role).

45. See S. S. Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory*, 51 OHIO ST. L.J. 645, 645 (1990) (stating that “[a]lthough firms generally recognize the need for more rational frameworks, and have made considerable efforts to improve management, serious organizational problems persist”) (citations omitted).

This section examines the structure of specialists' positions within firms, and considers some strengths and weaknesses of different structural arrangements. We first consider the issue of compensation, and the effect of direct compensation on the scope of the specialist's role. We then examine the relationship between firm size and the level of firm investment in specialists and other ethical infrastructure. Finally, we consider some strengths and weaknesses of specialists versus committees, and of practicing versus full-time specialists.

### *A. Compensation Structure*

Some firms view in-house compliance work as part of partners' general duties to the firm, and do not compensate partners directly for significant in-house advising. As participants from such firms explained:

You're expected as an attorney, and then as a partner, to pick up administrative duties around the firm, and that was one of the things I ended up doing. [B1]

The cliché in firms like this is that we are all owners, and this is part of the ownership function. [B2]

In-house service may be credited indirectly for compensation purposes, but most participants were uncertain as to whether and how this occurs:

We have firm management time: that's sort of an office billing that you do, which is completely ignored, I'm certain . . . [at] compensation time. [B7]

I would say that I am compensated for what I do, but I could never tell you how much. It's part of a tradition in the firm that's really like the one [another speaker] referred to. We've had a long practice of people serving on committees and performing various administrative functions, for which I am sure they all feel compensated, to some degree . . . [B6]

According to one participant, compensation for in-house service consists primarily of avoiding a penalty for refusing an administrative burden:

The percentage committee . . . from time to time, [has] explained how they arrive at percentages, and I still don't understand it [laughter]. The result is that most partners are afraid to do anything bad because they think it might [count] against them. They're not sure, but just to be on the safe side. So that's how compensation is handled. [B5]

In other firms, practicing partners bill the firm directly for the time that they spend on in-house compliance work, and such time counts equally with outside billings for compensation purposes. As one part-time in-house counsel explained, "I have an internal billing number for every in-house matter." [13] This

is the system described by Jarvis and Fucile in their article about their own in-house practice.<sup>46</sup>

Finally, some firms have full-time specialists who maintain no outside practice and are compensated only for in-house compliance work. In fact, one full-time general counsel, who occasionally does work for previous clients, turns over his outside earnings to the firm:

In terms of my compensation, I agreed a few years ago—I kind of evolved into this role, as did the other guy . . . I'm still a partner, but I have given up my rights to be compensated like a partner. In fact, I'm incentivized not to practice at all, but I still practice . . . for a couple of clients . . . I bill my time because I'm still providing services to the clients, but whatever I bill I give back to the firm, so that there's no issue that I really want to spend more time on this matter because I can make money doing it. [B11]

Thus, most of the participants in our study can be characterized as one of three structural types: practicing lawyers who are not compensated directly for in-house compliance work (n=14); practicing lawyers who are compensated for in-house compliance work (n=5); and full-time specialists with no outside practice, who are compensated only for in-house compliance work (n=10).<sup>47</sup>

#### ***B. The Effect of Direct Compensation on the Scope of the Specialist's Role***

Not surprisingly, the structure of compensation affects the scope of participants' roles. As we expected, most participants' core substantive jurisdiction is conflicts: all of the firms in our sample have special infrastructure for managing conflicts of interest; and two participants from very large firms are full-time conflicts specialists. The extent to which participants address issues other than conflicts, however, appears to be closely related to whether they are compensated for in-house work.

Practicing lawyers who are not compensated directly for in-house compliance work focus primarily on answering questions and tend to be protective of their time. Most report that the vast majority of questions that they handle are conflicts questions. Consider the following description from a participant in a 200-lawyer office:

I am the chairman of a committee of three partners and an associated staff member [who compose] the professional responsibility committee . . . For the most part we deal with issues under the rules of professional responsibility. A vast majority of what we do is conflicts work. What we are primarily called upon to do is to help analyze a conflict, help work through the procedures to

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46. See Jarvis & Fucile, *supra* note 6, at 105 (stating “[o]ur firm treats in-house and outside work equivalently for compensation purposes”).

47. This count does not include the retired partner or the associate being groomed for the in-house compliance function. See *supra* note 20. It also does not include one participant for whom we are missing compensation data.



get it resolved or determine that we can't take on the matter. That is less than the list of things that some other people . . . do. [B9]

Further, most participants who are not compensated for in-house compliance work are the only—or primary—resource in their firm. The following statement comes from the ethics partner in the 375-lawyer main office of a 500-lawyer firm:

I'm not a full-timer at this. I spend about 400, 500 hours a year . . . on the in-house ethics function. And I'm the only person who does it so those are the only hours being spent on the function . . . [A4]

As a result, uncompensated participants tend to characterize their in-house work as a “burden.” The following comments are typical:

If I were to lump all my time together, I'd say I spend about one-third of my time on this . . . It's non-billable time. That's a burden. [C1]

I'm always bumping around 500 hours per year. My total hours, billable and non-billable, usually bumping 2,500, 2,400. A terrible burden. The 500 hours, I would tell you, on a year-to-year basis, over the last maybe 10 years, is almost all reactive time . . . It's sort of one of my complaints, because it doesn't give me much chance, or anyone in the firm much chance, to spend time thinking proactively about policies and procedures. We probably have some gaps as a result of that. [C2]

Some participants complained in particular about the intrusion of non-conflicts questions:

Conflicts tend to dominate because it is regular and it is always there. There are also big money issues and usually somebody is getting disappointed or there is the potential for that. But the other stuff is there and it is quite annoying [laughter]. [A8]

Participants who are compensated directly, on the other hand, tend to play a much broader and more proactive role in their firms. In addition to answering individual questions, compensated participants report that they monitor internal systems, provide in-house training, and develop reference materials, much as Jarvis and Fucile describe in their article.<sup>48</sup> For instance, consider the following robust job description from a compensated ethics partner in the 300-lawyer main office of a 700-lawyer firm:

I have spent an awful lot of time developing our intranet site as an ethics and loss prevention library. We have links to every third party source I can find, the rules of all states, the opinions and Cornell kind of stuff [referring to the legal ethics section of the Cornell web site], but also more specialized things that are increasingly becoming available. And then the materials I have created . . . I have, say, an outline on each of the major Rules of Professional Conduct and if somebody said, “well, what's the rule on such and such, can you contact a former employee under Rule 4.2,” I may

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48. See Jarvis & Fucile, *supra* note 6, at 105–08.

well have that on hand . . . . And then you're able to say to people, "here's the answer and here's why . . . and I'm not making this up as I go along." If I did a job description I would have a section on systems monitoring and systems planning. That is, I spend a certain amount of time making sure our trust account is working the way it is supposed to . . . you can't just leave that to the accounting people. I review—more than I care to—our marketing materials and web site and that sort of thing because it is easy to—especially when you are in a lot of different jurisdictions the way we are—to say something on your central web site that, there's some stupid rule in some state that says you can't say that kind of thing . . . . We do a fair amount of non-lawyer ethics training too, and I think that's important . . . because the people in marketing and trust accounts and so forth . . . how do you know what is going on or what is not coming to your attention? . . . Try getting all the secretaries in the firm together and tell them what proper notarization practice is, and see if you don't get a few phone calls afterwards . . . I'd say about two thirds of my time or maybe sixty percent is for the firm . . . . [A14]

Firms that compensate in-house specialists on a part-time or full-time basis also tend to have more extensive ethical infrastructure than firms that do not. For instance, several full-time specialists in our sample are backed up by active committees and/or other compliance specialists. The part-time ethics partner quoted above ticks off the following ethical infrastructure in his firm:

We have a *pro bono* partner and employee benefits. Somebody counsels to the firm. Professional development partner, and myself. I was initially both professional development, training, and ethics partner. And I had my own ethics clientele. And I thought I could do all three things. And I really couldn't, and that was when there were 300 lawyers and now there are 700. So somewhere along the way I stopped being professional development partner and just have the ethics partner and my own clientele. [A14]

In fact, a number of compensated participants reported that the coordination of internal resources is a central part of their role. Several used the term "point person" to refer to this role. One full-time specialist said:

I think the firm looked at [the creation of my] position as having a point person. You can decide if it is a point person or a lightning rod . . . but a person that's out there that can serve as . . . the first point of contact . . . sort of a locus point for people to come to with all sorts of different questions on all sorts of different topics, from senior people to the most junior people . . . . Having been around since 1984 when I started, and always having been at the same firm, even in the summers, if it's not in my jurisdiction, I know where to send it. So I have that sort of—mediator is not the right word but—facilitator role. [B4]

And from a part-time, compensated specialist:

In our firm, the general counsel position is new, the position is only three or four years old . . . Obviously I don't do everything myself, but I know the partners in the firm to whom I can turn for expert opinions. And that is one of my critical roles . . . To some extent my job is coordinating. [A10]

It appears, therefore, that the firms' investment in in-house compliance specialists is related to their overall investment in ethical infrastructure, as well as to the underlying management structure of the firm.

### *C. The Effect of Size*

In part, of course, the extent to which firms invest in in-house compliance specialists and other ethical infrastructure is a function of firm size. In general, the larger firms in our sample tend to have more ethical infrastructure than the smaller firms, and to be more likely to compensate in-house specialists. For instance, the average size of the firms in our sample that compensate in-house specialists is roughly 850 lawyers, whereas the average size of firms that do not is roughly 350 lawyers.<sup>49</sup>

Firm investment is not simply a function of firm size, however. Of the eleven firms in our sample with over 500 lawyers, six compensate in-house specialists and four do not (we are missing data on one firm). Of the ten firms in our sample with full-time specialists, six have under 500 lawyers, and two have under 250 lawyers.

In addition, we observed several interesting exchanges among focus group participants about the role of firm size in determining the need for in-house specialists. Some participants who perform in-house work as an uncompensated service to the firm initially were skeptical that there would be enough work to justify a full-time position. Consider the following remark, from a participant from a 200-lawyer firm, "I am here from one of the smaller groups. The notion of a full-time person to do what I do, you know, they'd say, 'what are you, nuts?' Isn't it basically a function of size?" [B8]

Yet, a number of full-time specialists, including some from smaller firms, reported that once their position was created, they had no trouble filling their time.<sup>50</sup> In response to the above question, for instance, a full-time specialist from a 500-plus lawyer firm said:

I don't know whether it's exclusively a size issue or how you define the job. When the firm asked me, as a partner in the litigation area, to do this, back in 1993, on a full-time basis, I thought it sounded interesting, so I've done it. I have absolutely no trouble, with the size of our firm and the breadth of what I do, filling my day up quite fully with it. [B4]

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49. For a breakdown of firms by size category, see *supra* note 17.

50. This is consistent with accounts from general counsel in the news stories cited above. See *supra* note 10 and accompanying text.

Another full-time specialist, from a 400-lawyer firm, observed:

The thing I notice is, there's a lot more business now that we have made a resource available . . . we used to have a system where two of us would spend about 500 hours a year on conflicts, and maybe a third of that time on other professional responsibility matters. Now, in my new [full-time] position, I am astounded that I can't get everything done in a day and I don't think there are a lot of different issues than there used to be when we spent 1,000 hours on this. [A11]

And from a part-time, compensated specialist in a 200-lawyer firm, "I don't know how they managed without me!" [A9]

Further, once uncompensated participants heard what the compensated participants do, many admitted that the same needs probably exist at their firms. In response to the robust job description quoted previously, for example, one uncompensated participant said:

[A14's comment] points out, I think almost painfully, the benefit of having a full time person. I mean, he said about ten things that I know I ought to be doing and I don't—wouldn't dream of doing . . . . You know, things like reviewing the systems, trust accounts. I mean, the accounting department calls me occasionally with questions, and if anything they're probably too picky, so I feel reasonably comfortable about it. But there probably could be some big hole in there that I don't even realize is there. [A3]

We heard similar comments from several other participants. One especially candid senior partner stated the point succinctly, "The decision as to how to deal with ethical issues in our firm is not dictated by the quantum of the work." [B2] Thus, as one participant observed, there is no "industry standard" for the level of firm investment, even among firms of comparable size:

What occurs to me as I am sitting here listening is there is no industry standard for this. It's so clear, as we're talking about it. I don't know how many times I have said to either myself or a colleague: "I don't believe that this firm goes to this length to deal with an ethics issue," or "I can't believe that this firm *doesn't* go to this length" . . . . The spectrum is so broad. [A12]

Instead, it appears that, for the most part, firms get what they pay for. Firms that do not compensate partners for in-house compliance work provide no economic incentive for partners to invest in the role, but rely instead on partners' personal and professional commitments to the firm. This system may work to the extent that partners are personally committed: our sample includes two senior partners who invest a significant amount of their time in in-house compliance work, even though they are not compensated for this service by their firms. Several participants whose outside practices focus on professional liability also volunteer significant service to their firms. Without significant voluntary service by individual partners, however, participants' comments suggest that a lack of direct investment by the firm may result in "some gaps" in firm self-regulation.

*D. Some Strengths and Weaknesses of Different Structural Arrangements*

We now turn to two key structural variations among the sample firms: a reliance on specialists versus committees; and a reliance on full-time versus practicing specialists. The purpose of this section is to bracket the issue of overall firm investment, by assuming some optimal level of investment, and to consider separately the strengths and weaknesses of different structural forms.

*1. Specialists Versus Committees*

We first consider the strengths and weaknesses of specialists versus committees. A number of participants whose positions evolved from a larger committee cited efficiency as the primary motivation for the specialist form. For instance, the ethics partner with the robust job description, quoted above, explains the origins of his position as follows:

My position was created in the early 90s . . . . The firm had decided that committees weren't very efficient so it was going to spin off managerial responsibilities to the serious partners . . . . My predecessor was a four-member committee that kept minutes and you could just see, in today's terms, \$1600 bucks an hour ticking off. [A14]

Participants also cited the increasing complexity of ethics and regulatory issues and the resulting need for individual specialization. According to a specialist whose outside practice focuses in part on professional liability issues:

I think one reason, at least in my office, we started out with a larger committee and it came down to mostly my doing all the work . . . [is that] at least eighty to ninety percent of the inquiries I get, I know the answer or can work it through on my own . . . . Efficiencies alone suggest that one person is going to end up handling much of this. [C2]

Finally, making a single partner responsible for the firm's in-house compliance work makes it easier for the firm to evaluate the quality of that work and its cost. As one full-time specialist explains:

Another reason why my position became, over time, full-time, is because at some point the notion was, let's not have fifteen people on an ethics committee handling this, let's have one person, because if we don't like it we can jettison the person and, you know, we can identify what the cost is. [A12]

Participants also cited some disadvantages of relying on specialists, however, and some comparative advantages of committees. For instance, a number of participants emphasized the drawbacks of having only one person available as a resource in the firm:

I mean, one advantage of a committee is, if there is one person doing it and you go out of town or get sick, there is a big gap . . . . I mean, it's nice to be indispensable, but . . . it's a problem for the firm if there's just one person in whom all the knowledge and all of the advice resides. [A13]

In addition to problems of coverage, the use of specialists involves fewer partners in day-to-day decisions and may serve to limit internal dialogue about ethical issues. As noted above, one of the advantages of management-by-committee is that it involves a greater number of partners in internal compliance efforts and thus, over time, may help to produce a “well-sensitized partnership.”

Committees also provide access to multiple perspectives, which may enhance the quality and legitimacy of decisions (especially in the conflicts area). Consider the following comments by participants who are backed up by committees:

The committee will get involved in, I will say, deeper [matters]. For example, it can get involved in . . . conflicts issues that require more hands to be reviewing them . . . As everyone around the table knows, the rules can be read a lot of different ways, and a lot of different considerations can come into play, and sometimes there is a desire to have somebody more than [me] touch this one. Institutionally, we want to have that available. [B4]

We have a conflicts committee that meets as needed. That usually occurs when there is a need for a collective decision or people are not as willing to accept my decision . . . There’s [also] the possibility of going to the management committee, if people really want to, but that doesn’t happen very often. [B6]

Participants’ arguments about the relative benefits of specialists versus committees are important because they suggest some criteria for evaluating in-house compliance efforts. The ideal system for managing compliance would combine the strengths associated with specialists (efficiency, expertise, and accountability) with the strengths associated with committees (coverage and partner participation).

At the same time, it is important not to overstate the distinction between “specialists” and “committees.” As discussed in Part II, both specialists and committees come in many forms and most firms have hybrid structures. For instance, how would one characterize a multi-office committee, with one member per office? We encountered several examples of this structure in our sample:

We have a firm-wide ethics committee. Each office has someone on the committee. We don’t [meet]. Occasionally—very occasionally—we have conference calls. Haphazardly. If there is a reason to have one. I would say we have maybe two per year. We do meet at the annual partners meeting. And we communicate somewhat more frequently by e-mail, for instance, if there is a new policy being considered or some decision to take on a matter which has ethical implications. [I1]

Moreover, some of the weaknesses that participants attribute to “specialists” or “committees” actually stem from insufficient investment by the firm. Relying solely on one specialist creates potential problems of coverage, in addition to being a burden to the specialist if the firm does not compensate in-house service. Relying solely on a committee without incentives for individual leadership and substantive specialization may be inefficient, in addition to

ineffective. However, both sets of problems can be avoided by increased investment in the same structural form. For instance, a firm could have multiple compensated specialists or pay individual partners to serve as the permanent chairs of committees.

In the end, then, a firm's preference for specialists versus committees appears to be secondary to the issue of overall firm investment. Firms vary enormously in size, structure and management culture, such that no one structure will work for every firm. Our sample includes a variety of workable structural models based on a variety of combinations of specialists, committees and voluntary leadership. The key, we think, is for firms to be mindful of the potential weaknesses of different structural arrangements, and to invest sufficient resources in the compliance function.

## *2. Full-Time Versus Practicing Specialists*

We now turn to the relative benefits of full-time versus practicing specialists. We already have alluded to some advantages of full-time specialists. Full-time specialists tend to define their in-house responsibilities broadly and to take a proactive role in promoting ethics and regulatory compliance. The full-time specialists in our sample provide such important services as systems monitoring, training, and the development of print and electronic resources. One full-time specialist from a firm of only 100 lawyers reports that she has plenty of work, even without any outside practice.

Full-time specialists also may be more approachable than practicing specialists. One full-time specialist told us that she thought that partners were more likely to consult her than to consult a practicing partner, because they were less afraid of imposing on her time or appearing to be ignorant:

I think partners felt a comfort level about asking questions at an earlier stage than they would of the partners on the PR committee. They didn't have to worry about taking up my time, that I otherwise would be practicing; they didn't have to worry about seeming dumb. They felt I was in a less judgmental mode. [I2]

This kind of approachability may be especially important to associates, who may feel safer consulting a full-time specialist than a partner who evaluates their work. The participant just quoted reported that her position was created specifically for this purpose:

When I took this job, the PR committee was working fine. The concept originally was that my part would be primarily with associates—that associates might feel more comfortable—I am not a partner; my title is “special counsel.” So we thought associates might feel more comfortable coming to me with questions. [I2]

As will be discussed in Part IV, participants stressed that approachability is critical to their effectiveness. Most of the compensated specialists in our sample said that the biggest challenge of their position is getting people to come forward with issues. Yet while full-time specialists may be more approachable than practicing specialists, some participants questioned whether full-time specialists

could maintain credibility with practicing partners. As one participant put it, “They’re not down in the trenches and that’s what some lawyers are always talking about: “I’m in the trenches and you’re not.” So I think there is some benefit to . . . having an active practice. [C2]”

An active practice may be especially important for conflicts specialists, because practitioners presumably are sympathetic to the disappointment of losing potential business. As one conflicts specialist explained:

I think that the reason that the counseling is done by individuals who really are functioning, practicing lawyers—I’m a litigation partner, I have a litigation practice—is that we feel that people who are actively engaged in practice can bring experience to bear that’s important to take into consideration in resolving many of these issues. I also think that decisions, or the advice we give—I have no idea how much I cost the firm in the course of a year by telling them we can’t take on matters—I think the judgment is accepted more readily because it is coming from somebody who is an active partner in the firm. [B2]

Further, while most of the full-time specialists in our sample “grew up” practicing in their firms, and thus came into their positions with practice credibility, practicing specialists predicted that this credibility would wear off over time:

I think that you could have someone doing this full-time who has been close to the practice for most of her or his career, but I think if that person got into the position and then was in it too long exclusively, without being in touch with the practice . . . not working on a practice level with other lawyers . . . that the person does become somewhat isolated and in an ivory tower, if you will . . . [C2]

As a result, some practitioners questioned whether anyone in their firm would be attracted to a full-time, in-house job. As one practicing specialist remarked:

We don’t have a full-time person. The question is, where would we find one? How would we get that person to do [it] when they probably would flourish better in their own practice? And alternatively, do we want to bring someone in from the outside? . . . It takes fifteen years to be able to, you know, [build credibility] . . . But it would be great if we could figure out a way to move from our model . . . to a different model that would work. [A5]

And a full-time specialist agreed:

I think all of us . . . see an advantage in having experience in the firm . . . But at some point you have got to have people who want to do this or it doesn’t work. And there are going to be a number of firms who don’t have that . . . [A13]



One thing all participants agreed on was that the in-house specialist should not be an academic. As one participant explained:

There are certainly times when bringing an academic in would be the appropriate thing to do but kind of on isolated stuff, particular issues. [In other contexts] they could be too easily blown off. Basically someone—ivory tower, pie in the sky, no practical [experience]. [C1]

At which point an academic chimed in, “What could be worse than that? [Laughter].”

Despite their differing opinions on the benefits of an outside practice, participants agreed that the most important source of credibility for both full-time and practicing specialists is the visible support of firm leaders. One participant reported:

One of the things we talked about last night at our table was, one thing we could agree on is that none of this stuff works unless you have the power of the firm behind you. Whether or not you have individual power or how you get things done, whether it’s because you are a big rainmaker or have a pleasing personality, you need [top management support]. [A13]

Compensation, of course, is one way to signal management support. One full-time specialist in our sample, in negotiating the terms of her position, emphasized that she wanted a salary that would signal the firm’s respect for the job:

I said I don’t care about the money, the dollars, but I need a salary that indicates the respect of the law firm for the position. And I want the salary to remain in appropriate proportion [to the value of the position to the firm]. And that was important to me. Of course, no one knows my salary. But management knows it. [I2]

In another firm that we know of, full-time specialists’ salaries are tied to the value of partnership shares.<sup>51</sup>

Participants also emphasized the importance of the example set by powerful partners. For instance, the full-time specialist just quoted returned to her firm, after a fifteen-year absence, to a full-time, in-house position. Despite the fact that she does not practice and is not a partner—not to mention that she came from academia—she reported that she commands significant respect in her firm, thanks to the visible support of firm leaders:

When I first came, the associates weren’t sure who I was and how I was viewed by the firm. So the associates didn’t come to me. But the partners came immediately. Once the partners came to me, it permitted the associates to come to me . . . I am constantly consulted by the top people. The chairman of our firm—he is not the managing partner—he is more important. He is the biggest

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51. Personal communication with the managing partner of a 1,000-plus lawyer firm.

rainmaker, has the highest salary—he consults me constantly, and he sends his people to me. I save this law firm money by keeping them out of trouble. I do see other administrative positions, even at this law firm, that are not respected in the same way. [I2]

Thus, as in the comparison between specialists and committees, structural arrangements are only one aspect of firms' investment in regulatory compliance. Other aspects that are less measurable—leadership, culture—are no less important. We now turn to the personal and professional characteristics of in-house compliance specialists.

#### IV. CHARACTERISTICS OF IN-HOUSE COMPLIANCE SPECIALISTS

Most previous research on the role of in-house compliance specialists comes from the equal employment opportunity (EEO) or employee rights context, where there is a conflict of interest between employers and employees. This research finds that in-house specialists tend to identify with management interests and to side with employers at the expense of employee-grievants.<sup>52</sup> Thus, previous studies tend to emphasize the role of in-house compliance specialists in diluting, rather than promoting, regulatory goals.<sup>53</sup>

For instance, studies show that human resource and personnel professionals played a significant role in promoting the development of formal EEO policies and grievance procedures within organizations,<sup>54</sup> but that, in practice, internal procedures tend to undermine EEO rights, by recasting EEO claims as interpersonal problems and discouraging confrontation of potentially unlawful conduct.<sup>55</sup> Studies in the sexual harassment context, in particular, have

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52. See Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM J. SOC. 1589 (2001) (discussing the “managerialization” of EEO law); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) [hereinafter Edelman et al., *Internal Dispute Resolution*] (finding that internal complaint handlers tend to define “equal employment” in terms of existing managerial norms); Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 J.L. & POL'Y 73 (1991) (finding that structural ties to the employer may significantly bias specialists' handling of EEO complaints).

53. See Elizabeth Chambliss & Lauren B. Edelman, *Sociological Perspectives on Equal Employment Law*, in LAW'S DISCIPLINARY ENCOUNTERS: READINGS IN LAW AND SOCIAL SCIENCE (Victoria Saker Woeste et al., eds., under review; manuscript on file with author) (reviewing research on the role of compliance specialists in the EEO context).

54. See *supra* note 11.

55. See Edelman et al., *Internal Dispute Resolution*, *supra* note 52 (finding that internal complaint handlers tend to recast discrimination complaints as interpersonal problems); Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1, 31–40 (1996) (examining the “personalization” of EEO conflict in retaliation cases brought by EEO Officers); see also Richard L. Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 267–310 (Richard L. Abel ed., 1982) (arguing that the lack of formal procedural protections makes informal procedures highly susceptible to class, race and gender bias, especially in the employment context).

been critical of internal grievance procedures for legitimating the very conduct that the law is designed to prevent.<sup>56</sup>

These studies sound an important cautionary note for those, like us, who are interested in promoting the development of compliance procedures within law firms. Internal compliance procedures—and the specialists who manage them—potentially could serve primarily to legitimate unethical or unlawful conduct and to forestall more effective external regulation.

We are mindful of these studies and the cautions that they raise. However, two factors distinguish the regulatory context that we are addressing from the regulatory context addressed in most previous research. First, most professional regulation does not pit law firm partners against associates or other employees. Thus, unlike the EEO context, internal conflicts about regulatory goals and the standards for “compliance” will not necessarily split along hierarchical lines. On the contrary, since most firms’ compliance efforts focus on managing conflicts of interest, most internal regulatory conflicts are likely to be between partners.

Second, unlike human resource and personnel specialists, whose professional identity does not depend on legal expertise or a normative commitment to the goals of EEO law, in-house compliance specialists in the law firm context are distinguished precisely by their substantive expertise and their personal commitment to the goals of professional regulation. As noted above, nearly half of the specialists in our sample are volunteers who are not compensated directly for their in-house service. Furthermore, as we discuss in this section, most specialists in our sample express a strong normative commitment to ethics and regulatory compliance, and have a long record of related professional service.

Granted, we selected participants based on their reputations as in-house specialists; thus, our sample probably represents a group of particularly committed specialists. In addition, because our analysis relies on self-reports, we are not in a position to evaluate the accuracy of participants’ accounts. Nevertheless, it appears to us that the alternative to a committed specialist is no specialist at all, rather than a specialist whose primary function is to legitimate noncompliance. We suggest, therefore, that the primary issue (at least at this stage of firms’ structural development) is firms’ investment in in-house compliance specialists, rather than specialists’ commitment to the goals of professional regulation.

This section examines the nascent development of in-house compliance specialists as a professional group. We first examine the personal and professional characteristics of participants in our study, and their expressed commitment to their in-house role(s). We then discuss the main challenges that participants face and their strategies for promoting ethics and regulatory compliance in their firms.

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56. See, e.g., Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69 (2000); Anna-Maria Marshall, *Idle Rights: Employees’ Legal Consciousness and the Construction of Sexual Harassment Policies* (under review; manuscript on file with author) (finding that “the same power imbalances that render women susceptible to sexual harassment in the first place govern the grievance procedures that are supposed to address women’s complaints”).

Finally, we examine the emergence of professional networks among specialists, and speculate about future bases for professional organization.

#### *A. Personal and Professional Characteristics*

All but one of the specialists in our sample is a partner or in a position of comparable seniority, such as “of counsel” or “special counsel.” Over two-thirds of participants for whom we have law school graduation dates (nineteen out of twenty-five) graduated in the 1950s (n=4), 1960s (n=5), or 1970s (n=10). Most participants—like most partners—are men (twenty-seven out of thirty-two), and all are white.

Most participants practiced in their firms for many years before becoming involved in in-house compliance efforts, with litigation being the most common practice specialty. All but one participant (the associate) report significant litigation experience, and the associate, a recent law graduate, is a member of her firm’s business litigation group. Besides litigation, the most common practice specialties reported by participants are ethics and professional liability, insurance, banking, and bankruptcy.

Most participants expressed a strong commitment to promoting high ethical standards in their firms and the profession as a whole. Several characterized their in-house service as a “labor of love.” According to one uncompensated specialist, “It’s something of a personal commitment that keeps my door open, effectively, for people to come to my office.” [C2]

Most participants (twenty-three out of thirty-two) have a long record of service in bar associations, with an emphasis on committees dealing with ethics and professional responsibility issues, such as judicial ethics, *pro bono*, legal aid, and professional discipline. Many participants (n=10) also report service on bar and government committees dealing with civil rights. About one-third of participants (n=12) have law teaching experience, most as adjunct faculty of professional responsibility, and several continue to serve as adjuncts.

As a group, participants gave the impression of being meticulous, rule-oriented, and extremely cautious about exposing their firms to liability. One participant attributed her caution to her background as a litigator:

There are differences in the way litigators and corporate lawyers approach professional responsibility issues. I always look at everything I write, including internal e-mail, as potential evidence in a case. A litigator has a worst-case scenario attitude, whereas the corporate lawyers think it will all work out. They think, “We’re all so cooperative.” [I2]

In some cases, caution was evident even in participants’ manner of speech. When asked why he was approached to serve as in-house counsel in his firm, one participant gave the following response:

I don’t really know. I can’t really answer that. The person who had been doing it before thought I would be appropriate. I can’t say why. I could speculate, if I were forced. Maybe because I am very careful, thoughtful. [I3]

Participants' caution and commitment to protecting their firms' interests also were evident in their responses to our questions about possible research strategies. In each focus group, we spent one session asking participants for suggestions about how we might measure the "effectiveness" of internal compliance procedures. We asked specifically whether we could get access to information about the effectiveness of procedures in their firms. This question was met uniformly with laughter, followed by a polite response along the lines of "not in a million years." As one participant responded:

I wouldn't let you do it . . . I'll be damned if I am going to let those kinds of records outside . . . And every firm that's around this table, the person who'd be asked whether you can come in would be the person who's sitting right here. [A10]

On the whole, then, the specialists in our sample seemed experienced, committed, cautious, and intent on protecting their firms' reputations and interests. Many spoke in terms of keeping their firms "out of trouble," by which they meant insuring compliance with professional regulation. Thus, like in-house compliance specialists in the EEO context, the specialists in our sample clearly identified with "management" interests. In this context, however, loyalty to management appears to further regulatory goals.

### ***B. Challenges of In-House Practice***

Participants stressed two related challenges in their in-house practices: first, that they feel overburdened as an internal resource; and second, that there is no way to insure that people come forward with questions and problems. We already have discussed the burden on uncompensated participants, who field questions throughout the day while trying to conduct their own full-time practice. Consider the following comments by volunteer specialists:

Every day it's a constant flow of questions . . . They don't usually take more than ten or fifteen minutes each, but sometimes there's research that has to be done. [C3]

I answer the phone all the time. There's constant interruption . . . The pace of one's practice is much different when you've got 150 clients right there in the building who feel absolutely free to come in at any time, and who simply think they are the only ones and there aren't 149 others that are doing the same thing they are . . . [C2]

However, compensated specialists, too, report that they face significant time pressure in their in-house roles. Like all clients, in-house clients want their answers *fast*:

The one thing that I think is common at all of our firms is that the people we work with don't like to wait for answers. They like to have . . . their calls returned quickly. [B4]

People call me at home, and everything is an emergency. I was going to wall paper my office with those little yellow message slips, all of them say "it's an emergency, please call me within the next five minutes." I could work twenty-four hours a day . . . [I2]

Despite this complaint, participants worry that some questions never come to their attention. According to participants, the thing that keeps them “up at night” is how to get people, especially partners,<sup>57</sup> to raise rather than ignore ethical questions. As one participant said:

I’m never sure whether any of the major conflict issues or ethical issues are brought to my attention. There’s a great variation among members of the firm in terms of who I deal with . . . I find that I spend a lot of time with some partners and virtually no time with others and it can’t be that the ones I don’t spend any time with don’t have any ethical problems. [A9]

Some participants fear that their partners do not even recognize ethical questions.

What worries me is that I know from [my] experience of working with a lot of lawyers in a lot of different settings that there is a tremendous amount of ignorance about ethics . . . . And what worries me is that it is very haphazard as to who comes for assistance and who doesn’t, and I don’t spend the time on the systems the way other people do and I think that is something that is a very useful function . . . . I think that there are special types of problems that we’re not getting a handle on and may not be able to get a handle on . . . . I worry about laterals who come in with substantial practices and what’s happening with those folks . . . and about some of the biggest cowboys in the firm . . . who don’t come frequently for assistance. [A6]

Thus, as one participant put it, “Ninety percent of the problem is getting people to spot the issues and pick up the phone and call you.” [A4]

### *C. Strategies for Promoting Compliance*

Participants reported a variety of strategies for increasing ethical awareness and making themselves available—and approachable—within their firms. In part, they stressed, it is a matter of personality and fit:

How do you get people to come forward with issues so they may be resolved in the most appropriate way? . . . That’s the personality component of this particular job. If you have the right person operating in the right environment, you draw people to you and it becomes part of the culture. [A12]

Several participants emphasized the importance of being “nonjudgmental.” One participant described his attitude as “there but for the grace of God go I.” Participants also emphasized the importance of not saying “no” directly, especially on intake questions. The following comments are illustrative:

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57. The 2002 annual meeting of the Association of Professional Responsibility Lawyers (APRL), which focused on risk management in large law firms, devoted several sessions to problem of “rogues,” the “lone wolf,” and “other problem partners.” See ASS’N OF PROF’L RESPONSIBILITY LAWYERS, ANNUAL MEETING PROGRAM AND REGISTRATION BROCHURE (2002). Most of the specialists in our sample used the term “cowboy.”

I think one has to be somewhat nonjudgmental . . . [so that] others find it easy to approach you and to deal with the serious problems. [C2]

To be most effective, you have to go through a process of convincing your colleagues that “I’m not saying no, I’m just telling you all these things because eventually *you* are going to say no, and we are going to get where we want” . . . . Standing up in front of a group and saying “thou shalt not”—it tends not to work very effectively when you have 600 owners of a firm and each one believes he or she is autonomous. [A7]

If you say no all the time, people will go underground. And if they think that you give them correct advice—that you are on their side, you would like to do what you can to facilitate the acceptance of the matter but you know where the lines need to be drawn—they’ll come to you. [A5]

In addition to making themselves approachable, compensated participants stressed the importance of proactive strategies, such as going door-to-door. One full-time specialist told us, towards the end of a focus group:

[After the focus group] I’ll be getting on the train, to go to [a different city], and tomorrow at lunch I will talk to all the new attorneys who joined our [] office since last year, so they have a face they can attach with a phone number in [the city in which the main office is located] and say, “here’s what I do, here’s what resources I have that are available to you, here’s some rule provisions that might come up sooner rather than later, here’s some firm policies to be aware of.” That’s Thursday lunch. Friday lunch is talking to all the attorneys in the [] office on recent cases and ethics opinions in [that jurisdiction]. I think getting out there, and being there, brings people to me. [B4]

Another full-time specialist reported a similar door-to-door strategy:

I spend at least two days a month in each of our other offices. And when I’m in [our main office], I’m constantly just walking around the floors. I’ve knocked on doors rather than have people come to see me . . . . I have the luxury of time to be able to do that. [A11]

Compensated specialists also stressed the importance of regular in-house training, and other educational efforts such as e-mails and newsletters alerting firm members to regulatory developments. One full-time specialist runs a year-long, mandatory training series for new litigation associates. As she said:

It’s a competence issue. For instance, with our new litigation associate training we go through all aspects of it—case management, research, handling new cases, jurisdiction issues and fact investigations, pleadings, complaints and answers, ethics . . . . And there is no CLE credit. [I2]

Finally, several participants suggested tying in-house compliance efforts to lawyer compensation, either formally or by implication. For instance, one full-time specialist, who focuses primarily on managing conflicts, reported that he has

the ear of the firm's executive committee, and that he has, on occasion, reported uncooperative partners:

I can sometimes have an impact on someone's compensation because there are some people who are cooperative and some people who are not so cooperative . . . . And generally speaking, anybody, for example, who hasn't been very cooperative on conflicts issues is probably not cooperative on a bunch of other things around the firm. [A11]

Another example of using compensation as an incentive comes from a full-time specialist in a 200-lawyer firm, who bragged that her firm gets 100% attendance at its annual ethics program:

We hold our annual ethics [program] . . . on the night before final decisions are made in the Executive Committee for both percentages for the partners and compensation for associates, and that would be announced along with the mandatory nature of the program, and then the sign-up sheet was right there. And the second year [we did it this way], we got 100%. [A12]

Again, then, participants' comments illustrate the importance of direct investment in in-house compliance efforts. Firms that provide economic incentives and visible management support, not surprisingly, are perceived by participants to be more effective in promoting compliance than firms that do not. We now turn to the emergence of professional networks among specialists.

#### ***D. Emergence of Professional Networks***

Much of the influence of personnel specialists in the EEO context stemmed from their external organization as a professional group.<sup>58</sup> Not only does external organization bolster individuals' authority within firms, but professional networks are critical for spreading information and ideas between firms.<sup>59</sup> One reason that we are interested in the emergence of in-house compliance specialists is because of their potential to organize around this practice specialty. An active specialist group could play a leading role in defining industry standards for law firm self-regulation.

Currently, there is no formal association of in-house compliance specialists, which is not surprising at this early stage of professional development. Even in our "snowball" sample, which relied on professional networks to identify participants,<sup>60</sup> some participants report that they rarely interact with other in-house specialists.

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58. See Edelman, *Legal Environments*, *supra* note 11, at 1434 (discussing the influence of personnel professionals); Edelman et al., *Endogeneity of Legal Regulation*, *supra* note 12, at 412–25 (reviewing articles in management and personnel journals touting the benefits of internal grievance procedures).

59. See Edelman & Suchman, *Legal Environments*, *supra* note 12, at 498–501 (reviewing research on the role of professional networks in spreading particular compliance strategies among organizations).

60. See *supra* note 19 and accompanying text.



Many participants do, however, interact with their firm's liability insurer; and some insurers organize periodic meetings of firm representatives. ALAS, for instance, holds an annual educational conference for its members and attendance is viewed as a perk. As one participant noted, "If you are the ALAS coordinator, you get a free trip to someplace like Bermuda." [B5]

ALAS also provides ongoing loss prevention counseling to its insureds, a practice that reportedly is catching on among other insurers (such as Lloyds).<sup>61</sup> Several participants credit ALAS for shaping the development of in-house compliance efforts in their firms; and we heard similar comments about the role of other insurers, "We got a lot of help from ALAS, loss prevention and ethics help." [A7]

In [my city] there are a dozen or so large law firms and all but one of them is insured by [name of insurer] and there are periodic meetings of the loss prevention counsel . . . . And certainly with every one of those law firms . . . there's someone who everyone readily identifies as the person you go to with loss prevention issues for sure, but also, I think, with ethics issues. And at all of those firms, I know the people . . . who do that sort of thing. . . . [A14]

These comments suggest that insurers are likely to play a central role in the development of professional networks among in-house compliance networks, as well as in the definition of industry standards for compliance.<sup>62</sup> Professional associations that focus on ethics and liability issues, such as the Association of Professional Responsibility Lawyers (APRL),<sup>63</sup> also may be important arenas for promoting exchange.

Ultimately, however, in-house compliance specialists face a unique set of issues and challenges due to their structural position(s) within firms, and many participants in our sample are eager for professional guidance. Consider the following list of questions from a full-time general counsel:

Somebody comes in and reports to you; do you document or do you not? I mean, do you use e-mail? I hate e-mail. I don't want anything on the system . . . . Do you give—do you have a little sign that says

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61. Personal communication with in-house compliance specialists at two large law firms insured by Lloyds.

62. For a discussion of the role of insurers as regulators of law practice, see Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 *FORDHAM L. REV.* 209, 231 (1996) (arguing that "the bar has proved itself to be supremely self-serving in regulating itself" and welcoming the role of insurers); Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 *FORDHAM L. REV.* 233 (1996) (discussing the ways in which liability insurers also act self-interestedly).

63. Founded in 1990, APRL is "an independent national organization of lawyers concentrating in the fields of professional responsibility and legal ethics, including: law professors; bar association counsel; counsel for respondents in disciplinary hearings; ethics expert witnesses; legal malpractice litigators; counsel to disciplinary committees; and in-house law firm ethics counsel." See ASS'N OF PROF'L RESPONSIBILITY LAWYERS, MISSION STATEMENT, at <http://www.aprl.net> (last visited Sept. 12, 2002). Several participants in our study are active in APRL.

I'm the firm's lawyer, not yours? . . . If I get a sexual harassment complaint . . . what role am I doing? I think there are a lot of questions . . . I talked to [people at APRL] about . . . [my in-house] role, what do I do? And the answer was, "we're very glad you've joined [the association], we don't have any idea." [A13]

Thus, to the extent that in-house compliance specialists become institutionalized in large law firms, we expect to see the emergence of a new association—or perhaps new initiatives by APRL or the American Corporate Counsel Association (ACCA)<sup>64</sup>—to represent in-house specialists' interests as a professional group.

## V. CONCLUSION

Our analysis is based on a small, non-random sample and is necessarily exploratory. Because we selected participants based on their reputations as in-house specialists, we suspect that they represent a set of particularly compliance-oriented firms. Further, most of the firms in our sample are headquartered in the Northeast, whereas some important geographic areas, such as California, are not represented at all.

Nevertheless, we think our analysis raises a host of interesting questions for more systematic research. First, how prevalent are in-house compliance specialists in law firms, controlling for size? When were most positions created? What are the fastest growing titles? Are there significant regional variations? To answer these basic descriptive questions would require a national random sample of firms; however, as we have noted, even the most systematic survey of formal positions and titles would reveal relatively little about specialists' functional roles.

Second, how specialized are in-house compliance "specialists," in terms of the percentage of time that they devote to the in-house role? We deliberately defined the role of "in-house compliance specialist" broadly, including some people who spend less than 300–500 hours per year on in-house work. Yet our sample also includes full-time specialists and practicing specialists who spend 1,500 hours per year on the in-house function. Does it make sense to group all these lawyers together, as if they represent some kind of developmental continuum?

Third, what, if anything, does this range of investment tell us about firms' functional needs? Our analysis suggests that size is an important, but not determining, factor in the level of firm investment in the compliance function. Based on participants' comments and rough controls for size, it appears to us that some firms invest significantly more than others, and that the level of direct

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64. Founded in 1982, ACCA has over 13,000 members representing over 6,000 corporations in the US and abroad. See AM. CORPORATE COUNSEL ASS'N, ABOUT ACCA/GCCA, at <http://www.acca.com/about/index.php> (last visited Sept. 12, 2002). Membership, however, is limited to "attorneys who practice law as employees of organizations and who do not hold themselves out to the public for the practice of law." See AM. CORPORATE COUNSEL ASS'N, BECOME A MEMBER, at <http://www.acca.com/MemberCentral/becomemember> (last visited Sept. 12, 2002). Thus, in-house compliance specialists who maintain an outside practice are not eligible for ACCA membership.

investment reflects firms' values as much as their needs. To test this idea systematically, however, would require a broader sample of firms and more accurate measures of firms' (versus specialists') overall investment.

Finally, how do firms' investments in the in-house "compliance" function compare to their investments in other management functions? Are firms with full-time managing partners more likely to also have general counsel or other full-time managers devoted to ethics and regulatory compliance? Do firms committed to management-by-committee spend *less* time managing, or is it simply a matter of centralized versus decentralized management? Are there certain regulatory issues (such as conflicts) that demand a centralized approach? Our impression is that management-by-committee tends to result in lower overall investment in the compliance function, and that such firms are increasingly vulnerable to gaps in professional self-regulation. Again, however, we can only speculate given the exploratory nature of our study.

In addition to these empirical questions, the emergence of in-house compliance specialists raises a host of regulatory questions that our analysis does not begin to address. Like corporate counsel, in-house counsel in law firms face special professional challenges in balancing their duties to the firm, its members, its clients, and the public. Moreover, in-house counsel in law firms face additional challenges as a result of the law firm setting and the emergent nature of their role. Given the increasing importance of in-house compliance efforts, and the increasing scrutiny of such efforts by federal regulators, we hope that researchers and legal ethics scholars will invest in addressing these questions.